company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on unenclosed grounds, through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. That is their paramount duty. To enable them to perform it, the law entitles them to a clear track, 7 Harris, 298; 12 Harris, 496.

Neither cows nor man, not even the servants of the company engaged in the company's work, are permitted to obstruct it. And because their right to a clear track is absolute, their duty to carry safely is imperative. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences.

This doctrine in Skinner's case, designed for the safety of the passenger, was so applied in this case as to compromise it. Herein was manifest error. The case must go back to be tried on the question, whether there was anything in the particular circumstances of the accident to repel the prima facie presumption of negligence.

It is impossible to regard the accident as inevitable. If cattle were in the habit of coming upon the road at that place, or if there was nothing to prevent them, it was a contingency that the company were bound to anticipate and provide against.

The judgment is reversed, and a *venire de novo* awarded.

In the Chesterfield (Va.) Circuit Court—October Term, 1857.

THE RICHMOND AND PETERSBURG RAILROAD COMPANY *vs.* MARTHA J. JONES.[1]

1. A Railway Company, in the prosecution of its lawful business, is entitled to the same protection, and subject to the same responsibilities, as a natural person.
2. The want of skill and caution, in the exercise of its privileges, is the true ground upon which to base any right to recover damages for an injury done to another by a railway company while engaged in its lawful business.

[1] We are indebted to the January number of the Quarterly Law Journal for this case.—*Eds. Am. Law Reg.*

3. The fact that cattle are killed by collision with a railway train, at a point where the railway track crosses a country road, does not render the company responsible in damages, for it has a right to cross the highway, observing proper care and caution to avoid accident.

4. And the owner of the cattle cannot recover in such case, without proving want of skill and caution on the part of the company.

5. The case is much less favorable to the owner, where cattle are killed, straying on the track of the company, remote from the point of intersection.

6. The fence law of Virginia does not make it lawful for the cattle of persons in the neighborhood to be upon the track of a railway, unenclosed by a lawful fence, but merely deprives the company of any remedy against the owners of cattle for any damages which may result to the company from their straying on such unenclosed track.

7. In an action against a railway company for damages for killing cattle, the *onus* is on plaintiff to prove negligence and misconduct on the part of the company.

8. It is not sufficient for the plaintiff to show the killing by the company, but it is incumbent on him to show some act of misconduct on the part of the company, to make out a *prima facie* case of injury.

Roscoe B. Heath and *C. C. McRae* for the plaintiff in error.

Henry Hudnall for the defendant.

The opinion of the court was delivered by

NASH, J.—The facts of this case, as disclosed by the record, are as follows: The Richmond and Petersburg Railroad Company, being a company legally incorporated by an act of the General Assembly for the construction of a railroad from Richmond to Petersburg, to carry passengers and freight over the same, by means of locomotives and cars propelled by steam power, was, on the 8th day of April, 1856, lawfully engaged in running their train upon their road, when, at or near the crossing of a public or county road, the train ran over a cow belonging to the plaintiff in the court below, and killed her, to recover the value of which this suit was brought. It also appears that the Richmond and Petersburg Railroad Company, at the time of building their road, were assessed with heavy damages for the benefit of the land owners, for keeping up the additional fencing rendered necessary by the construction of their road. It was also proved, that the cow was found dead upon the track of the railroad, not more than eight or ten yards from the crossing

of the public road, with her body mangled, and traces of blood and hair were seen upon the ground and sills, tending to show that the killing had occurred at or near the intersection of the two roads. It was further proved that Mrs. Jones, the owner of the cow, was a lady living in the neighborhood, but whose lands did not adjoin the railroad, who, like most of the inhabitants of that part of the country, was in the habit of turning out her cattle to graze and range upon the unenclosed lands of the neighborhood. There was no proof offered, upon either side, to show whether the train was running at the usual speed or not, or to show any want of care and skill in the management of the train on the part of the conductor or engineer. Upon this state of facts, the jury found a verdict for the plaintiff below, and the court rendered judgment for the value of the cow; and it is the legality of this verdict and judgment that I am now called upon to review.

The property destroyed is of small value, but the principles involved are of an interesting character, both to the railroad company and to the people of this county and as there are a number of other suits depending in this court of a like character, I have been requested to reduce my views of the law applicable to such cases, to writing. In the first place, I will premise, that while the books and law journals of the day furnish us with numerous decisions of the courts of England, and the other States of the Union upon similar subjects, I am not aware that there has been any decision of the Court of Appeals of Virginia upon this subject, doubtless owing to the fact that the amount involved would not authorize such a case to be carried to that court. The principles of law by which this case is to be decided, are few, and of a familiar character. The Richmond and Petersburg Railroad Company are the exclusive owners of their road, along which their trains are conducted, and are engaged in a useful pursuit authorized by law, in carrying freight and passengers over their road by means of locomotives and cars propelled by steam power. This is their regular and lawful business, and in the prosecution of which they are entitled to the same protection, and are subject to the same responsibilities as a natural person. Every man in society has a right to pursue his own lawful

business, but if in the prosecution of it he inflicts an injury upon another by his own negligence or improper conduct, he is responsible therefor. So, on the other hand, if a man is engaged in the prosecution of his lawful business, and an *accident* occurs, by which another is injured, without negligence or misconduct on his part, he is not responsible for it. These principles result from the very nature and organization of civil society, and lie at the foundation of all such questions as we are now considering. Hence it is manifest that the want of skill and caution in the exercise of their privileges is the true ground upon which to base any right to recover damages for an injury done to another by a railroad company while engaged in their lawful business. But it is said that the business of running a locomotive upon a railroad is one attended with great and peculiar danger. This is certainly true, but the principle is in no degree varied, except that it imposes a greater degree of caution and care in that mode of transportation and travel, than could be required in the ordinary and less dangerous modes. The degree of skill and caution must always be in proportion to the liability to accidents and danger incident to the business.

But this case presents some other questions which it may be proper for me to consider. From the testimony in the case it is not exactly certain whether the cow was killed, being found straying upon the track of the railroad, at some distance from the crossing of the public road, or was killed exactly at the point of intersection of the two roads. I will consider the case in both aspects of the evidence. 1st. Upon the hypothesis that she was overtaken upon the public road, exactly at the point of intersection of the two roads, which is putting the case upon the most favorable ground for the plaintiff. In that case, the cow was passing upon a public highway, where she had a legal right to travel. And it is equally true that the railroad company had a legal right to run their locomotives and cars upon that part of their track which crosses the county road. If the collision occurred there, does it not present the familiar case of two individuals, who have a common right to travel on the same road, and which imposes upon each the duty of so exercising that right as not to injure the rights of others. The maxim *sic utere*

tuo ut alienum non lædas, here emphatically applies. And here again the obligation of the railroad company to observe a proper degree of caution and care, in passing such points upon their road, becomes manifestly necessary. And in view of the peculiar nature and mode of traveling by locomotives propelled by steam, I hold it to be the duty of every railroad company not only to blow their whistles, but to slacken the speed of their trains upon approaching and passing all such places; and in the event of a failure to do so, and the happening of a collision at such a point, I should certainly hold them responsible for any injury that might occur.

The other view of the case, that the cow was found straying upon the track of the railroad, remote from the point of intersection certainly makes a case less favorable to the plaintiff than the one which I have just considered; and if the plaintiff could not recover in the former, without proof of the want of skill and caution on the part of the railroad company, she can certainly have no right to recover in the latter case. It was contended, however, by her counsel in the argument of the case, that our fence law, which denies to a land owner the right to recover damages for injuries to his crops and lands by trespasses of stock, except where his lands are enclosed by a lawful fence, was enacted with reference to the known habit and usages of the people of the country in turning out their stock to graze upon the unenclosed lands of the neighborhood, and was an implied permission to the owners of stock to do so. I do not consider our fence law as conferring any additional right upon the owners of stock, but only to limit and restrict the right of the land owner to recover damages to cases where his lands are enclosed by a lawful fence. This I take to be the extent and scope of its operation. And in the event of a suit by the railroad company against the owner of stock, by reason of their trespassing upon their road, and causing their cars to be thrown from the track, it might be a good defence to such an action that the road was not enclosed by a lawful fence. But concede that our fence law gives to the owners of stock the implied right to turn them out to graze upon the unenclosed lands of the neighborhood, this, at most, is permissive only, and the owner takes upon himself all the risk of *accidents* which

may befall them, as well as a liability for the damage they may do to lands enclosed by a lawful fence. If cattle thus turned out to graze at large upon the unenclosed lands of the neighborhood, should stray upon the track of a railroad, the utmost obligations upon the railroad company would be, to use all proper care and caution to avoid an injury to them. But if by *inevitable accident* they are killed, it is the misfortune of the owner, and he must bear the loss.

Another question has arisen in this case, about which I have heard some diversity of opinion expressed, and that is, upon whom does the burthen of proof rest, in regard to the question of care and diligence on the part of the company, after the stock owner has established the fact of killing. This question, I think too, may be readily settled by a reference to the familiar rules of practice in courts of justice. The plaintiff who goes into court, complaining of injury, is bound to make at least a *prima facie* case, and if the previous reasoning of the court is correct, it is incumbent upon him to show some act of misconduct on the part of the company before he can even make a *prima facie* case of any injury. The failure to exercise proper care and diligence lies at the very foundation of the action, and if he stops short of this proof, he fails to make out even a colorable case for damages. In order to test this view of the subject, suppose the plaintiff (as it actually occurred in one of the counts in this case) had merely charged in his declaration that the railroad company, while in the regular pursuit of their lawful business, had ran over and killed her cow, without any charge of negligence or misconduct on their part. Can it be doubted that such a count would be demurrable? If, then, an allegation of negligence or want of skill be a material allegation, is it not the duty of the plaintiff to prove it? I deem it unnecessary to say more upon this topic, or to notice the reasoning founded upon the supposed inconvenience and difficulty on the part of the stock owner to prove the want of diligence and caution on the part of the agents of the company. These are considerations which might with some plausibility be addressed to the Legislature. But the courts of the country must expound the law as it is. For the foregoing reasons the judgment of the county court must be reversed.